

**IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS**

ANITA GAULDOCK,
Appellant,

v.

ROBERT A. McDONALD,
Secretary of Veterans Affairs,

Appellee.

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

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Vet.App. No. 15-2893

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

I. ISSUE PRESENTED

Whether the Court of Appeals for Veterans Claims should affirm the May 5, 2015 Board of Veterans' Appeals' (Board) decision that denied entitlement to service connection for the cause of the Veteran's death.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252(a).

B. Nature of the Case

Appellant, Anita Gauldock, appeals the May 5, 2015, Board decision that denied entitlement to service connection for the cause of the Veteran's death. (Record (R.) 2-13).

C. Statement of Facts

The Veteran had active duty service from March 1967 to March 1970 and from April 1971 to April 1974. (R. at 4, 915). In September 2002 and May 2004¹, the Regional Office (RO) issued rating decisions that denied the Veteran's claims for entitlement to service connection for kidney, bladder and skin cancer. (R. at 543 (452-43, 541-46), 638 (636-38)). These decisions became final and were unappealed. (R. at 30 (29-38)).

The Veterans March 2012 death certificate, (R. at 1145), shows that the immediate cause of death was "invasive moderately differentiated adenocarcinoma of the sigmoid colon" due to or as a consequence of bone and lumbar spine metastasis and small bowel obstruction. In May 2012, Appellant, the Veteran's wife, filed a claim for entitlement to Dependency and Indemnity Compensation (DIC). (R. at 1130 (1130-44)). The RO issued a rating decision that denied service connection for the cause of the Veteran's death in September 2013. (R. at 1099 (1099-1102)). In February 2013, Appellant submitted a notice of disagreement (NOD) (R. at 1012 (1012-13)), arguing that the Veteran was

¹ The April 2004 rating decision found that no new and material evidence was submitted to reopen his claims. (R. at 543 (452-53, 541-46)).

exposed to Agent Orange while in Vietnam. The RO issued a Statement of the Case (SOC) in July 2013, (R. at 975-1006), and Appellant filed a VA Form 9 in August 2013 (R. at 957 (957-58)).

III. SUMMARY OF ARGUMENTS

Appellant has failed to meet her burden to show that a medical opinion was required regarding her claim for DIC. She points to nothing in the record that shows a reasonable possibility that an examination would aid in substantiating her claim. Accordingly, the Board's May 5, 2015, decision should be affirmed.

IV. ARGUMENT

A Veteran's death will be considered service connected when a service-connected disability "was either the principal or a contributory cause of death." 38 C.F.R. § 3.312(a); see 38 U.S.C. § 1310. For a service-connected disability to be considered a contributory cause of death, it must be shown that it contributed substantially or materially to the production of death, combined to cause death, or aided or lent assistance to the production of death. 38 C.F.R. § 3.312(c).

A surviving spouse is eligible for DIC benefits when a qualifying Veteran dies from a service-connected disability. 38 U.S.C. § 1310; 38 C.F.R. § 3.5(a). The service-connected disability may be either the principal or a contributory cause of death. 38 C.F.R. § 3.312(a). The Board's decision must include a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record; the statement must be

adequate to enable an appellant to understand the precise basis for the Board's decision, and to facilitate informed review in this Court. See 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

The Secretary's duty to provide a medical opinion in a disability compensation claim is found in 38 U.S.C. § 5103A(d)(2). *DeLaRosa v. Peake*, 515 F.3d 1319, 1322 (Fed. Cir. 2008). The duty to provide an opinion in a DIC case, however, comes not from 5103A(d)(2), but instead, from the Secretary's general duty to assist as found in subsection (a) of that statute. *Id.* However, the Federal Circuit held that § 5103A(a) "does not always require the Secretary to assist the claimant in obtaining a medical opinion or examination." *Id.* Rather, VA is required to assist a claimant in obtaining a medical opinion or examination whenever such an opinion is "necessary to substantiate the claimant's claim." 38 U.S.C. § 5103A(a)(1); *DeLaRosa*, 515 F.3d at 1322. The statute "excuses VA from making reasonable efforts to provide such assistance, if requested, when 'no reasonable possibility exists that such assistance would aid in substantiating the claim.'" *Wood v. Peake*, 520 F.3d 1345, 1348 (Fed.Cir. 2008) (quoting 38 U.S.C. § 5103A(a)(2)).

The Court reviews the Board's factual finding that VA satisfied its duty to assist under § 5103A(a) under the "clearly erroneous" standard of review. *Hyatt v. Nicholson*, 21 Vet.App. 390, 395 (2007); see also 38 U.S.C. § 7261(a)(4). Under that standard, the Court can overturn the Board decision "only when there is no 'plausible basis in the record' for the decision." *Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997) (quoting *Gilbert v.*, 1 Vet.App. at 53).

Appellant argues that the Board erroneously applied 38 U.S.C. § 5103A(d) to find that there was no indication from the record that the Veteran's service-connected disabilities were related to the cause of his death. (Appellant's Brief (App. Br.) at 6). She avers that the Board failed to apply the appropriate legal standard under 38 U.S.C. § 5103A(a), arguing that there was no requirement that the record include an "indication" that the Veteran's death was related to service. *Id.* at 7. Appellant also argues that "the Board failed to explain why there is no reasonable possibility that a medical opinion as to whether Agent Orange caused the Veteran's fatal cancer would substantiate the claim," citing the National Academy of Sciences' (NAS) conclusion that there was inadequate or insufficient evidence to determine where there is an association between colon cancer and AO Exposure. *Id.* at 7-8. Appellant further contends that the medical evidence of record indicates that there may be a relationship between the Veteran's colon cancer and service, including diagnosis of four different types of cancer. *Id.* at 9 (citing R. at 93, 190, 583, 653)).

In this case, citing 38 U.S.C. § 5103A(a), the Board determined that a medical opinion need not be obtained because there was no indication that the Veteran's service-connected disabilities were related to the cause of his death, and, therefore, "there is not a reasonable possibility that obtaining a medical opinion would substantiate the claim." (R. at 7 (2-13)). It also observed that the Veteran did not have colon cancer during service or within a year of service and found that presumptive service connection was not warranted in this case. *Id.* at 7, 11. The Board also found that direct service connection for the cause of the Veteran's death had not been established. *Id.* at 11-12.

As a starting point, the Board cited to the correct standard under 38 U.S.C. § 5103A(a) and found that there was no reasonable possibility that obtaining a medical opinion would substantiate the claim, which Appellant readily concedes. (R. at 7 (2-13)); (App. Br. at 6). To the extent that Appellant argues that the Board erroneously applied the standard in 38 U.S.C. § 5103A(d) he has not established any prejudicial error. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant bears burden of demonstrating error on appeal), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table); *Shinseki v. Sanders*, 556 U.S. 396, 407–410 (2009) (under the harmless error rule, the appellant has the burden of showing that he suffered prejudice as a result of VA error). Indeed, assuming *arguendo* that the Board did apply erroneous standard, which the Secretary does not concede, the Federal Circuit in *DeLaRosa* found that the use of § 5103A(d) was harmless error because an opinion was not

required in that case due to the Board's finding of the lack of "competent medical evidence" that the Veteran had the claimed disability that purportedly caused his death. 515 F.3d at 1322. The Federal Circuit clarified this holding in *Wood*, explaining the *DeLaRosa* decision "was predicated on the indisputable lack of any competent evidence" of the Veteran's alleged disability. *Wood*, 520 F.3d at 1350.

In this case, Appellant would not be entitled to a medical examination under 38 U.S.C. § 5103A(a) because she has cited to no evidence, competent or otherwise, that demonstrates any connection between the Veteran's colon cancer and service. See (App. Br. at 4-10). While Appellant avers that the Veteran's diagnoses of numerous cancers evidences a possibility that his colon cancer may indicate some relation to service, she fails to provide any reasoned analysis or authority for this conclusion. *Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) ("The Court requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments."), *rev'd on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008) (per curiam order); *Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain underdeveloped arguments); *Kern v. Brown*, 4 Vet.App. 350, 353 (1993) (explaining that the appellant's attorney was "not qualified to provide an explanation of the significance of the clinical evidence"). Indeed, the mere fact that the Veteran had non-service connected conditions does not qualify as

“competent evidence” of a connection to service. Moreover, the Secretary notes that the Veteran was denied entitlement to service connection for kidney, bladder, and skin cancers in final rating decisions in September 2002 and April 2004 (R. at 543 (452-43, 541-46), 638 (636-38)). The reliance on conditions that have been specifically found to be unrelated to service as evidence of service connection, albeit for a different condition, would violate well-established notions of finality and *res judicata*. *Routen v. West*, 142 F.3d 1434, 1437-38 (Fed. Cir. 1998) (applying finality and *res judicata* to agency decisions when the requirements of statutory and legal exceptions are not met); *Cook v. Principi*, 318 F.3d 1334, 1337 (Fed. Cir. 2002) (en banc) (“Principles of finality and *res judicata* apply to agency decisions that have not been appealed and have become final”).

To the extent that Appellant relies on the NAS’s finding that there is insufficient evidence to determine whether there was an association between colon cancer and AO exposure, she fails to explain how this is “competent medical evidence” of a link to service. See *DeLaRosa*, 515 F.3d at 1322. Indeed, the crux of Appellant’s argument is that an inability to produce sufficient causation is tantamount to evidence of a positive association of causation.² Such

² The Secretary notes that the Appellant’s citation to the “Veterans and Agent Orange: Update 2012” is no longer functional. See (App. Br. at 8); <http://iom.nationalacademies.org/Reports/2013/Veterans-and-Agent-Orange-Update92012.aspx> (last visited June 1, 2016). However, the 2012 Update can be found at <http://www.ncbi.nlm.nih.gov/books/NBK195090/> (last visited June 9, 2016).

a conclusion, however, strains common sense. Indeed, the lack of evidence simply is not favorable evidence to her claim

Appellant's speculation that the Veteran's presumptive exposure to AO may have caused his colon cancer, however, does not amount to a showing of prejudicial error in this case. *Hyatt*, 21 Vet.App. at 395; *Hilkert*, 12 Vet.App. at 151; *Sanders*, 556 U.S. at 407–410. Appellant merely cites to evidence that essentially finds that current medical knowledge is inadequate to determine a link between colon cancer and service and speculative evidence of the contribution of non-service related conditions to colon cancer. Moreover, Appellant posits no reason for how a medical opinion in this case would benefit her claim, as her main evidence notes that “there is inadequate or insufficient evidence” to opine whether colon cancer is related to AO exposure. See (App. Br. at 8); *Winters v. West*, 12 Vet.App. 203, 208 (1999) (en banc) (“[A] remand is not required in those situations where doing so would result in the imposition of unnecessary burdens on the [Board] without the possibility of any benefits flowing to the appellant.”). As such, the Board's decision should be affirmed.

The Secretary has limited his response to only those arguments raised by Appellant in her brief, and, as such, urges this Court to find that Appellant has abandoned all other arguments not specifically raised in her opening brief. See *Norvell v. Peake*, 22 Vet.App. 194, 201 (2008). The Secretary, however, does not concede any material issue that the Court may deem Appellant adequately raised and properly preserved, but which the Secretary did not address, and

requests the opportunity to address the same if the Court deems it to be necessary.

V. CONCLUSION

In light of the foregoing, Appellee, the Secretary of Veterans Affairs, requests that the Court affirm the May 5, 2015, Board decision.

Respectfully submitted,

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